Supreme Court, U.S.
FILED
APR 21 1971
ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1539

ATLANTIC COAST LINE RAILROAD COMPANY, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Respondents.

THOMSON PHOSPHATE COMPANY,
Respondent,

v.

ATLANTIC COAST LINE RAILROAD COMPANY, et al.,
Petitioners.

ON PETITON FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT, THOMSON PHOSPHATE COMPANY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

HARRY TEICHNER,
66 Court Street,
Brooklyn, N. Y. 11201,
Attorney for Respondent,
Thomson Phosphate Company.

April 15, 1971.

268 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

TABLE OF CONTENTS

	PAGE
Question Presented	1
ARGUMENT—The petitioners have failed to show any special or important reason why this Court, in the exercise of sound judicial discretion, should review this case on writ of certiorari	2
This case does not present any important question of federal law	2
There is no conflict between the decision below and prior Commission decisions	3
Certiorari is not appropriate	3
Conclusion	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1539

ATLANTIC COAST LINE RAILROAD COMPANY, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Respondents.

THOMSON PHOSPHATE COMPANY,
Respondent,

v.

ATLANTIC COAST LINE RAILROAD COMPANY, et al.,
Petitioners.

ON PETITON FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT, THOMSON PHOSPHATE COMPANY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Question Presented

The respondent, Thomson Phosphate Company, is dissatisfied with the petitioner's presentation of the "Question Presented". Rules of U. S. Supreme Court, Rule 40 (3).

The allegation of the question presented is improper because it states the erroneous conclusion that Rule 25 (f) of the General Rules of Practice Before the Commission, 49 C.F.R. 1.25 (f), was not complied with. The Commission, the District Court for the Southern District of New York and the Court of Appeals for the Second Circuit have found that the requirements of said Rule 25 (f) were met and justified the reopening of the informal complaint. The petitioners disagree with that finding of fact and the only question presented is

> Whether Thomson's informal complaint was reopened by the Interstate Commerce Commission in compliance with its General Rules of Practice and the Interstate Commerce Act.

ARGUMENT

The petitioners have failed to show any special or important reason why this Court, in the exercise of sound judicial discretion, should review this case on writ of certiorari.

Rule 19 (1) (b) of the Rules of this Court, though neither controlling nor fully measuring this Court's discretion, sets forth the character of reasons which will be considered in passing upon a petition for certiorari to a court of appeals. The petitioner attempts to make out one of those reasons, *viz.* that the Court of Appeals for the Second Circuit has erroneously decided an important question of federal law which has not been, but should be, settled by this Court. The respondent, Thomson Phosphate Company, however, respectfully submits that neither that nor any other reason exists for granting the writ.

This case does not present any important question of federal law

Rule 25 (f) of the Commission's Rules of Practice requires that a resubmission of an informal complaint be

made upon an additional fact basis. The existence of that rule is not questioned. The Commission, the District Court for the Southern District of New York and the Court of Appeals for the Second Circuit have held that there was compliance with the Rule. However, the petitioners disagree and contend that there was no compliance. It is respectfully submitted that it is not the customary function of this Court on certiorari to review the record to make its own determination on a question of fact, such as whether there was compliance with Rule 25 (f).

Parenthetically, any findings of fact and conclusions of law by the Florida District Court and by the Court of Appeals for the Fifth Circuit must be disregarded by reason of the fact that this Court held in *I.C.C.* v. *Atlantic Coast Line R. Co.*, 383 U. S. 586, that the Florida District Court was without jurisdiction to entertain the action.

There is no conflict between the decision below and prior Commission decisions

There is no merit to the petitioners' suggestion that the decision below is in conflict with prior Commission decisions. The Commission has found that under the facts and circumstances here present, an additional fact basis existed for the reopening of the informal complaint. In making such determination the Commission exercised no discrimination, preference or prejudice in the application of Rule 25 (f). This action was consistent with prior Commission decisions.

The petitioners' contention that the Commission's findings and orders are not supported by substantial evidence is an unwarranted conclusion. The record clearly supports the action of the Commission.

Certiorari is not appropriate

The petitioners would have this Court review every case where an informal complaint before the Commission has

been reopened on an additional fact basis, for *de novo* determination by this Court as to whether an additional fact basis existed in support of such reopening. It would be a work of supererogation to demonstrate that such procedure is not the purpose of certiorari.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respecfully submitted,

HARRY TEICHNER,
Attorney for Respondent,
Thomson Phosphate Company.

April 15, 1971.